

In re Sellard Case No. 383-01035-S7

6/25/90 DDS unpublished

The court denied the debtor's motions to reopen his bankruptcy case and revoke the order of discharge which was entered on June 28, 1983. An order of discharge is a final judgment. A party seeking relief from a final judgment must establish a basis under Bankr. R. 9024 which adopts FRCP 60.

The debtor thought that his bankruptcy case would be dismissed because he reported to the Judge at his discharge hearing that he had settled his debts. The debtor took no further actions to revoke the order of discharge that had already been entered, or to dismiss the case, until April 10, 1990.

The court may only relieve a party from a judgment based on mistake if the motion is filed within one year of the judgment. FRCP 60(b)(1). The debtor did not establish any extraordinary circumstances which would justify relief from operation of the judgment under FRCP 60(b)(6). Because the debtor was not entitled to have the order of discharge set aside, the motion to reopen the case was also denied.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 383-01035-S7
MICHAEL COLLINS SELLARD,)
aka M. C. Sellard,) MEMORANDUM IN SUPPORT OF ORDER
) DENYING DEBTOR'S MOTION TO
Debtor.) REOPEN CASE AND REVOKE DISCHARGE

The debtor filed this chapter 7 case on March 31, 1983. An order of discharge was entered on June 28, 1983. The debtor filed a motion to reopen the bankruptcy case and revoke the discharge on April 10, 1990, and a supplemental motion, memorandum and affidavit on May 31, 1990. For the following reasons, the motions to reopen the case and revoke the discharge should be denied.

The debtor claims he reached a settlement with his creditors which he reported to the court at the discharge hearing on September 16, 1983. He expected the case to be dismissed based on his report. The debtor represented himself, and did not take any further action to revoke the order of

discharge that had been entered on June 23, 1983, or to dismiss the case. He wants the discharge set aside because he has paid his creditors in accordance with the settlement, and he does not want the bankruptcy discharge on his credit record.

The order granting a discharge is a final order subject to Bankr. R. 9024. To revoke the order of discharge and dismiss the bankruptcy case, the debtor must provide a basis to do so under F.R.Civ.P. 60. The debtor claims that the order was entered by mistake because he thought that the case would automatically be dismissed after he reported the settlement to the judge at the discharge hearing.

F.R.Civ.P. 60(b)(1) provides that the court may relieve a party from a final judgment or order for mistake, inadvertence, surprise or excusable neglect. However, the motion must be made within a reasonable time, and not more than one year after the judgment or order was entered. The debtor's motion to revoke the discharge was filed more than six years after the order of discharge was entered, and it is therefore outside the court's discretion to set aside the order under F.R.Civ.P. 60(b)(1).

The debtor's supplemental memorandum also refers to F.R.Civ.P. 60(b)(6), which permits the court to relieve a party from a judgment for "any other reason justifying relief from the operation of the judgment." A motion brought under Rule 60(b)(6) must be for some reason other than those contained in

Rule 60(b)(1) - (5). Corex Corp. v. United States, 638 F.2d 119, 121 (9th Cir. 1981), citing, Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1949).

To fall within the scope of Rule 60(b)(6), a party must establish extraordinary circumstances. Ackermann v. United States, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950). Facts supporting such a motion could include reliance on the court or failure of the clerk to send notice of the entry of the order. Molloy v. Wilson, 878 F.2d 313 (9th Cir. 1989). The order of discharge was entered before the discharge hearing. The debtor has not rebutted the clerk's certificate that a copy of the order was mailed to the debtor on June 28, 1983, so it is presumed the debtor received a copy of the order. The debtor's affidavit does not state that the judge informed him that the case would be dismissed, the debtor just claims he assumed the court would do so. No justification for such a presumption is presented. If the debtor expected the case to be dismissed, he should have made some effort to verify that it was dismissed. The debtor has not presented any extraordinary circumstances to bring the motion within the scope of Rule 60(b)(6).

Even if the one year deadline were not applicable, the debtor did not file his motion within a reasonable time after the order was entered. Six years is simply too long. The debtor wants the discharge set aside because he does not want the order to harm his credit. The discharge apparently did not

have any adverse affect on him for the six years between entry of the order and filing of the motion, and he has not given any specific facts as to why the order is harmful after all this time.

The debtor's motion claims that he reached settlement with his major creditor. The documents he attached were entered over a year after the order of discharge was entered. It is possible that the discharge was considered by the creditor in reaching the settlement. It is also not clear from the documents provided that the other creditors were paid in full. Too much time has elapsed to reconstruct the debtor's prepetition financial status.

Although the motion to reopen the case is specifically excluded from the one year limitation found in Bankr. R. 9024, there is no reason to reopen the case if the court cannot afford relief to the debtor. Since the debtor is not entitled to the relief he seeks of revoking the discharge, both the motion to reopen and the motion to revoke discharge should be denied. A separate order will be entered.

DATED this _____ day of June, 1990.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Robert LeChevallier
Michael B. Batlan
U. S. Trustee